

THE
C A S E
O F

The Most Noble *DOUGLAS* Duke of
HAMILTON and BRANDON, touching the
Peerage of BRANDON.

2603. In the Year 1603, James the Sixth, King of Scotland, acceded to the Crown of England. His Majesty, soon after, created several of his Scotch Subjects PEERS OF ENGLAND; and particularly, the Duke of Lenox, who was the King's nearest Relation on the Father's Side, was, in the Year 1613, created a Peer of England by the Title of Earl of Ribmond.

1619. James, Marquis of Hamilton (who was the King's nearest Relation on the Side of his Mother, Mary Queen of Scots), was, in the Year 1619, created a Peer of England, by the Title of Earl of Cambridge; by which Title his Son, James Duke of Hamilton, was, during the Civil Wars in the Year 1649, arraigned, tried and condemned for High Treason. This English Peerage was next enjoyed by his Brother, William Duke of Hamilton; but, upon the Death of William without Issue Male, the Title and Peerage of Cambridge became extinct, and the Dukedom and Peerage of Hamilton devolved upon his Niece Ann Duchess of Hamilton, the Daughter of the said James Duke of Hamilton and Earl of Cambridge.

King Charles the First created the Earl of Elgin a Peer of England, by the Title of Lord Bruce.

King Charles the Second created another Earl of Elgin an English Earl, by the Title of Earl of Aylesbury; and created the Duke of Lauderdale Earl of Guildford.

King James the Second created John Lord Churhill of Aymouth in Scotland, Lord Churhill of Sandridge in England, who was afterwards created Duke of Marlborough.

Queen Anne, a little Time before the Union, created John Duke of Argyll Earl of Greenwich.

Thus, during a Period of more than 100 Years, from the Union of the Two Crowns to the Union of the Two Kingdoms, Peers of Scotland had been created Peers of England, and as such had sat and voted in Parliament without Interruption.

In like Manner, divers English Subjects, Baronets and others, were created PEERS OF SCOTLAND by King James the First, King Charles the First, and King Charles the Second; and several of those Peerages are still enjoyed by their Descendants, with all their attendant Privileges.

By the Fourth Article of the Treaty of the Union, ratified, approved, and confirmed by the Act of the Fifth of Queen Anne, Chap. VIII. intituled, *An Act for the Union of the Two Kingdoms of England and Scotland*, it is declared, That from and after the Union, there shall be a Communication of all Rights, Privileges and Advantages which do or may belong to the Subjects of either Kingdom, except where it is otherwise expressly agreed in these Articles.

The Twenty-second Article of the Treaty is as follows: "That by virtue of this Treaty of the Peers of Scotland at the Time of the Union, Sixteen shall be the Number to sit and vote in the House of Lords;" and then it goes on and prescribes the Mode of electing them.

The Twenty-third Article directs, That the aforesaid Sixteen Peers of Scotland, who are to sit in the House of Lords of the Parliament of Great Britain, shall have all Privileges of Parliament which the Peers of England now have, and which they or any Peers of Great Britain shall have after the Union, and particularly, the Right of sitting upon the Trials of Peers; and in case of the Trial of any Peer in Time of Adjournment or Prorogation of Parliament, the Sixteen Peers shall be summoned in the same Manner, and have the same Powers and Privileges at such Trial as any other Peers of Great Britain: And that in case any Trials of Peers shall hereafter happen when there is no Parliament in being, the Sixteen Peers of Scotland, who sat in the last preceding Parliament, shall be summoned in the same Manner, and have the same Powers and Privileges at such Trials as any other Peers of Great Britain: And that all Peers of Scotland, and their Successors to their Honours and Dignities, shall, from and after the Union, be Peers of Great Britain, and have Rank and Precedency next and immediately after the Peers of like Orders and Degrees in England at the Time of the Union, and before all Peers of Great Britain of the like Orders and Degrees who may be created after the Union; and shall be tried as Peers of Great Britain; and shall enjoy all Privileges of Peers, as fully as the Peers of England do now enjoy the same, or as they or any other Peers of Great Britain may hereafter enjoy the same, except the Right and Privilege of sitting in the House of Lords, and the Privileges depending thereon, and particularly the Right of sitting upon the Trials of Peers.

May 1, 1707.
The Union of the Two Kingdoms. The Union of the Two Kingdoms commenced the 1st of May 1707; and the then Parliament of Great Britain being dissolved in the Beginning of the Year 1708, a Proclamation was issued the 26th of April 1708, for electing the Sixteen Peers of Scotland returnable the 1st of July.

May 26, 1708.
The Duke of Queensberry created Duke of Dover. Her late Majesty Queen Anne was pleased, by Letters Patent under the Great Seal of Great Britain, dated the 26th of May 1708, to grant to James then Duke of Queensberry the Honour, Style, Title and Dignity of Baron of Rippon and Marquis of Beverley in the County of York, and Duke of Dover in the County of Kent, to him during his Life, and after his Death to his Second Son the late Duke, by the Name of Charles Earl of Solway, and his Heirs Male; and in Pursuance thereof a Writ was issued to summon the said Duke to Parliament.

The Duke of Queensberry soon after went to Scotland, to be present at the Election of the Sixteen Scotch Peers, the 17th of June 1708; and his Grace attempted to vote at that Election as a Scotch Peer, and as Proxy for the Earl of Delorain; but this was much opposed, and a Protestation was made against it.

After the Parliament met, viz. the 19th of November 1708, the said James Duke of Queensberry was, as Duke of Dover, introduced in his Robes to the House of Peers, took his Seat as usual in such Cases, took the Oaths, and no Objection was made to him.

Some

Some of the Scotch Peers thinking an Injury was done to them by the Return made of the Sixteen Peers to serve in Parliament, and apprehending themselves duly elected by a Majority of good Votes, petitioned the House of Peers, complaining of that undue Return of the Sixteen Peers. One of the material Objections insisted upon by the petitioning Peers against the Sitting Peers was, That the Election had been carried for the Sitting Peers, by the Vote of the Duke of Queenberry and Dover; whereas he being a Peer of Britain as Duke of Dover, could not vote either in his own Right, or as Proxy for another; and this Matter coming to be considered by the House of Lords the 18th of January 1708, they agreed to hear Counsel upon the following Question, *viz.*

Whether a Peer of Scotland, claiming to sit in the House of Peers by virtue of a Patent passed under the Great Seal of Great Britain after the Union, and who now sits in the Parliament of Great Britain, had a Right to vote in the Election of the Sixteen Peers, who are to represent the Peers of Scotland in Parliament?

Counsel of both Sides were heard the 21st of the laid Month of January, and their Lordships came to the following Resolution, *viz.*

It is resolved and declared, by the Lords Spiritual and Temporal in Parliament assembled, That a Peer of Scotland, claiming to sit in the House of Peers, by virtue of a Patent passed under the Great Seal of Great Britain after the Union, and who now sits in the Parliament of Great Britain, had no Right to vote in the Election of the Sixteen Peers who are to represent the Peers of Scotland in Parliament.

The next Day, their Lordships came likewise to the following Resolution:

It is resolved and declared, by the Lords Spiritual and Temporal in Parliament assembled, That a Peer of Scotland, who had not a Right to vote at the Election of the Sixteen Peers for Scotland, had not a Right to give a Vote, as Proxy, in the Election of the Sixteen Peers who are to represent the Peers of Scotland in Parliament.

In pursuance of these Resolutions, the Votes of the Duke of Queenberry, in his own Right, and as Proxy, in the Election of the Peers of Scotland, were rejected; and as a Consequence, the Marquis of Lotbien was removed from his Seat in the House of Peers, to which he had an undeniably Title, if the Duke of Queenberry's Patent, as Duke of Dover, had not given him a Title to sit and vote in the House of Peers; and upon the same Ground the Marquis of Annandale was admitted to a Seat in the said House.

The Duke of Queenberry's Vote at the Election of Scots Peers rejected, because he was a Peer of Great Britain.

He continued to sit and vote as Duke of Dover in the House of Peers during Two Parliaments, and till his Death. September 10, 1711. The Duke of Hamilton created Duke of Brandon.

James Duke of Queenberry, as Duke of Dover, sat and voted in Two several Parliaments, till his Grace died; nor was any Objection ever made, or any Resolution taken in the House of Peers against him.

In the Year 1711, Queen Anne was pleased, by Letters Patent under the Great Seal of Great Britain, dated the 10th Day of September, in the Tenth Year of her Reign, to create James, then Duke of Hamilton (the eldest Son of Anne, Duchess of Hamilton, who was the Daughter of the said James Duke of Hamilton and Earl of Cambridge, who had suffered in the Year 1649), Baron of Dutton in the County Palatine of Chester, and Duke of Brandon in the County of Suffolk, and the Heirs Male of his Body, with a Limitation to the Heirs Male of the Bodies of William and Anne, late Duke and Duchess of Hamilton.

Extracts from the Journals of the House of Lords, 12th December, 1711.

Notice is taken in the List of the Nobility, delivered by Garter King at Arms the 7th Instant, that in the List of the Nobility, delivered by Garter King at Arms the 7th Instant, there is inserted, James Hamilton, Duke of Hamilton and Brandon, amongst the Dukes; and the House being informed that a Patent is lately passed the Great Seal for creating the said Duke of Hamilton Duke of Brandon, and a Debate arising thereupon,

It is ordered, by the Lords Spiritual and Temporal in Parliament assembled, That on the 20th Day of this Instant December, this House will take the said Patent in Consideration; and that Basil Herne, Esq. the Riding Six Clerk for the last Year, or his Deputy, do then lay the Privy Seal Bill of the said Patent before this House, and all the Lords summoned to attend.

18th December, 1711.

The House being this Day moved, That his Grace the Duke of Hamilton may be heard, by his Counsel, on Thursday next, in relation to the Patent for creating him Duke of Brandon,

It is ordered, by the Lords Spiritual and Temporal, in Parliament assembled, That the Duke of Hamilton shall be heard, by his Counsel, as desired, on Thursday next at Twelve o'Clock, before this House takes into Consideration the said Patent.

Ordered, That all the Judges do attend this House on Thursday next at Twelve o'Clock.

20th December, 1711.

The Officer attending (according to Order), with the Privy Seal Bill of the Patent for creating the Duke of Hamilton Duke of Brandon, he was called in, and delivered at the Bar the said Privy Seal Bill, with a Copy of the Inrollment thereof.

The Counsel on behalf of the Duke of Hamilton were called in, and the Copy of the Inrollment of the said Patent was read.

The Counsel were heard, and withdrew.

And after Debate, and reading some Proceedings out of the Journal in the Duke of Dover's Case, the Question following was proposed to be put to the Judges, *viz.*

Whether the Queen be disabled, by the Act of Union, to grant a Peerage of Great Britain, with all the Privileges depending thereon, to any Person who was a Peer of Scotland before the Union?

Which being objected to, and a Debate arising thereupon,

This Question was stated, That the Judges do now deliver their Opinions to this House upon the said proposed Question.

After further Debate, the previous Question was put, Whether this Question shall be now put? It was resolved in the Negative.

Then it being proposed, That no Patent of Honour granted to any Peer of Great Britain, who was a Peer of Scotland at the Time of the Union, can intitle such Peer to sit and vote in Parliament, or to sit upon the Trial of Peers,

And Debate thereupon,

The Question was put, That no Patent of Honour granted to any Peer of Great Britain, who was a Peer of Scotland at the Time of the Union, can intitle such Peer to sit and vote in Parliament, or to sit upon the Trial of Peers.

It was resolved in the Affirmative.

Dissentient,

Buckingham P. I. Because, as we apprehend, by this Resolution, the Prerogative of the Crown in granting Patents of Honour, with all Privileges depending thereon, to the Peers of Great Britain who were Peers of

December 20, 1711.
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fident
Peers against the Re-
folution which excluded
the Duke of Brandon
from his Seat and Vote
in the House of Peers.



of *Scotland* at the Time of the Union, as well as the Right of the Duke of *Brandon* to sit and vote in Parliament, are taken away. And this Prerogative of the Crown, and Right of the Duke, depending upon the Construction of an Act of Parliament, though Counsel, by Order of the House, were heard at the Bar, and all the Judges were ordered to attend at the same Time, yet the Opinion of the Judges was not permitted to be asked touching the Construction of the said Act of Parliament.

2. Because the Prerogative of the Crown, as we conceive, in granting Patents of Honour, with the Privileges depending thereon, ought not, on the Construction of an Act of Parliament, to be taken away, unless there be plain and express Words to that Purpose in the said Act; and we conceive there are no such plain and express Words for that Purpose in the Act of Union.

3. Because by this Resolution all the Peers of *Great Britain* who were Peers of *Scotland* at the Time of the Union, are supposed to be incapable of receiving any Patent of Honour from the Crown, by virtue whereof they may be intitled to the Privilege of sitting and voting in Parliament, and sitting on the Trial of Peers; which, we conceive, is repugnant to the Fourth Article of the Act of Union, which declares the Privileges, that there shall be a Communication of all Rights, Privileges, and Advantages, which do or may belong to the Subjects of either Kingdom, except where it is otherwise expressly agreed in those Articles, in which, we apprehend, there is no such Provision.

4. Because the Duke of *Queenberry*, in all Respects in the same Case as the Duke of *Hamilton*, was introduced, sat, and voted in this House, in Matters of the highest Importance, in Two several Parliaments, as Duke of *Dover*, by virtue of a Patent passed since the Union; and in consequence of such sitting and voting, his Vote in the Election of the Peers of *Scotland* was rejected; and, as a further Consequence thereof, the Marquis of *Lothian* was removed from his Seat in this House, which he had an undeniably Title to if the Duke of *Queenberry*'s Patent as Duke of *Dover* had not given him a Title to sit and vote in this House.

5. Because by this Resolution the Peers of *Scotland* are reduced to a worse Condition, in some Respects, than the meanest or most criminal Subject.

6. Because we conceive this Resolution may be construed to be a Violation of the Treaty between the Two Kingdoms.

<i>Winchelsea,</i>	<i>Rivers,</i>	<i>Mar,</i>	<i>Loudon,</i>	<i>Balmerino,</i>
<i>Hunsdon,</i>	<i>Ormonde,</i>	<i>Blantyre,</i>	<i>Paulett,</i>	<i>Roseberrie,</i>
<i>Hume,</i>	<i>Orkney,</i>	<i>Osborne,</i>	<i>Kilfylthe,</i>	<i>Oxford and Mortimer,</i>
<i>Harcourt, C. S.</i>	<i>Ilay,</i>	<i>Boyle,</i>	<i>Clarendon,</i>	

Upon the 2d of January 1711-12, George Lord *Duplin*, eldest Son and Heir Apparent of the Earl of *Kinsoul*, a Peer of *Scotland*, being created, by Letters Patent of the 31st December preceding, Baron *Hay of Pedwarden*, was introduced, presented his Patent, and took his Seat without Objection.

In the Year 1719, Charles, then Duke of *Queenberry* and *Dover*, petitioned his Majesty for a Writ of Summons to Parliament as Duke of *Dover*, claiming by Virtue of a Limitation in the Patent to him under his then Title of Earl of *Solway*; his Majesty being pleased to refer the Petition to the House of Peers, it was, upon the 14th of January 1719-20, resolved, that the Duke of *Dover* had not a Right to a Writ of Summons to Parliament.

Upon the 19th of January 1726, David, eldest Son of the Duke of *Montrose*, having been created Earl of *Grabam*, by Letters Patent dated the 23d of May 1722, was introduced. Upon reading the Patent, and the Writ of Summons, the Proceedings in the Case of the Duke of *Hamilton*, created Duke of *Brandon*, as entered in the Journal of the 12th December, were also read; and a Motion being made to appoint a Day to take the Patent into Consideration, the same was laid aside by the previous Question, and the Earl (who upon the Debate had withdrawn) was thereupon called in and admitted to take his Seat in the usual Form.

The Effect of a Patent of Honour granted to the eldest Son and Heir Apparent of a Peer of *Scotland* hath never since been questioned, though there have been various Instances of such Creations. Nor have the Proceedings of the House of Lords, in the Case of the Duke of *Hamilton*, been ever brought again under the Consideration of the House.

The present Duke of *Hamilton* and *Brandon*, Great-grandson of the said James Duke of *Hamilton* who was created Duke of *Brandon* in 1711, most humbly conceives that the above stated Resolution of the House of Peers of the 20th of December 1711, by the express Words of it, extending only to the Case of *Scotch* Peers at the Time of the Union, who at a later Period were created *English* Peers, does not affect him, the Peerages of *Hamilton* and *Brandon* having descended upon him at one and the same Instant of Time.

The Words of the Resolution of the 20th of December 1711 import no more, than that a Peer of *Great Britain*, who was a Peer of *Scotland* at the Time of the Union, is not himself capable of exercising the Rights incident to a Patent of Honour. But the Issue Male of such Person, who must be Peers of *Great Britain*, and cannot possibly be Peers of *Scotland*, in the Sense of the Resolution, are not subject to the same Disability; for the Descent of a *Scotch* Honour creates no Incapacity to take by Descent a *British* Peerage; nor does it extinguish any Right vested by prior Creation. An Alien born, naturalized or made a Denizen, a Subject who does not conform to the established Religion, may, if the Sovereign pleases, be created Peers. They are both disabled by Law from sitting and voting in Parliament, or from sitting upon a Trial of a Peer. But the Patent, when it gives an Estate of Inheritance, vests a Right transmissible to the Issue; who, if they are not subject to the like Disabilities, may enjoy every Privilege incident to that Right, and would be intitled to a Writ of Summons to Parliament.

The Duke of *Dover*'s Case does not affect the Duke of *Hamilton*, the Duke of *Dover* having been created, before the Union, Earl of *Solway* in *Scotland*; which Honour, though granted during his Infancy, it was held he could not have, and the Title of *Dover* was claimed by him, not by Descent, but by Purchase.

In the Proceedings upon the Case of the Title of *Brandon*, the Prerogative of the Queen to grant the Title of *Brandon* was not permitted by the House of Peers to be brought into Question, nor was it maintained that the Patent was void: When therefore the Right under that Patent descends to a Person under no supposed Disability, the Duke of *Hamilton* humbly infests he is intitled to all the Benefits of it.

The Duke of *Hamilton* begs also to lay considerable Stress upon the uniform Tenor of Authorities admitting Heirs Apparent of *Scotch* Titles, created Peers of *Great Britain* since the Union, to a Seat amongst your Lordships after the Descent of their *Scotch* Titles upon them: Because he is not able to discover any Arguments applicable to the Construction of the Act, which can distinguish their Claim from his own; but he conceives that the Claims of such Persons, and that which he now maintains, are both materially distinguishable from the

the Case of a *Peer of Scotland before the Union*, created an *English Peer after it*, upon whose *personal Incapacity* only your Lordships have twice decided.

The Duke of *Hamilton* further begs leave to observe to your Lordships, how difficult it is to entertain a Conclusion, that the *Act* which united the two Kingdoms, and was founded in *Compact* between them, disabled not only those who were then *Peers of Scotland*, but also their *Descendants*, from enjoying a *Right* of the highest Honour and Importance for any *Subject of Great Britain* to attain, and which the *Peers of Scotland* had enjoyed for a Century and upwards.

The Duke of *Hamilton* is advised, that when a *Doubt* arises between two *Constructions*, one of which *destroys* an *antecedent Right*, and the other *preserves* it, the *Rule of Law* rejects the former and adopts the latter. He therefore presumes to hope, that a *Construction* of the *Act of Union*, favourable to *his Claim*, will be adopted by your Lordships in *Preference* to one that militates against it, if there is even a *Doubt* between them; because if the *Act of Union* can disable him to sit and vote as an *English Peer*, it certainly derogates from one of the most inherent *Rights* of the *Crown* of these *Realms*, and imposes the most humiliating *Disability* upon one *Class of Subjects*.

But the Duke of *Hamilton* by no means admits any *Doubt of Construction*, whether a *British Peer* claiming by *Descent*, though from an *Ancestor* so created since the *Union*, who was also a *Peer of Scotland* at the *Time of the Union*, can sit and vote in the *Parliament of Great Britain*: The *Act of Union* conveying no such *Disability* in *express Terms*, or by *natural Inference*.

The Duke of *Hamilton* conceives the sound, and the natural *Construction* to be, That Sixteen *elected Scotch Peers* are to sit and vote in the *Parliament of Great Britain* by virtue of that *Election*, merely as *Representatives of the Peerage of Scotland*; and that all other *Scotch Peers* are, in that *Character* alone, to enjoy every *Right* incidental to an *English Peerage* before the *Union*, except that of sitting and voting in the *Parliament of Great Britain*. This *Construction* takes away no *Right*, and results naturally from the *Words*, not affecting, in any *Degree*, the *Capacity* of *Scotch Peers* who might receive, in future, *Patents of Peerage* under the *Great Seal of Great Britain*, to sit and vote as such in the *Parliament of Great Britain*.

The just and true Meaning of the *Act in Question* may be further collected from the *Construction* put upon it by the *Crown*, as well as by the *Subject*, soon after the *Act* passed, and affirmed by the *Peers*. Her Majesty Queen *Anne* almost immediately asserted the *Right* in dispute; the *Subject* also asserted it, and the *Peers* allowed it. The *Affent*, therefore, of the *Sovereign*, as well as that of the *Peers*, must have been given in the *Dark* to this Part of the *Act*, if it can extinguish a *Right* of such *Importance*. For, in a Month after the *Act* passed, the *Queen* conferred upon a *Peer of Scotland* a *British Peerage, with all its Rights*. The *Peers* received him, he sat and voted in two *Parliaments*, without any *Imputation* upon his *Right*; and the *Peers*, in *his Case*, emphatically adopted the *Distinction* which the Duke of *Hamilton* has urged in this *Address* to your Lordships; namely, That a *Peer of Scotland*, sitting in the *House of Peers* by virtue of a *Patent under the Great Seal of Great Britain*, is not considered as a *Peer of Scotland* in that *House*, or distinguished from any other *Peer of Great Britain*.

AR. MACDONALD.
J. DUNNING.
GEORGE HARDINGE.

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1702
The Most Noble DOUGLAS Duke of
HAMILTON and BRANDON, touching the
Peerage of BRANDON.



16 May 1702